

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

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In the Matter of )	
Implementation of Section 621(a)(1) of )	
the Cable Communications Policy Act of 1984 )	MB Docket No. 05-
311	
as amended by the Cable Television Consumer )	
Protection and Competition Act of 1992 )	

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**Comments and Recommendations of**  
**Kelley Giberson, Law Student, Loyola Law School, Los Angeles, CA.**

To Chairman Martin, Commissioner Abernathy, Commissioner Copps, Commissioner Adelstein and all those concerned:

As a law student studying telecommunications I understand the important role that competition can play in an industry. I am hopeful that the multichannel video programming industry will soon realize the benefits of increased competition. Some assert that in order to realize those benefits, the commission must regulate local franchising authorities (LFA's) in order to expedite the franchising process and prevent undue burdens on franchise applicants. They argue that regulations are needed to implement Section 621(a)(1) of the Communications Act of 1934 (the Act) which reads, "A franchising authority...may not unreasonably refuse to award an additional competitive franchise."<sup>1</sup> While it may sound like a simple solution for the Commission to put such regulations in place, there are several questions that must be answered before deciding if and how the Commission should proceed in

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<sup>1</sup> 47 U.S.C. § 541(a)(1).

implementing Section 621(a)(1). First, does the Commission have the authority to impose regulations or guidelines on LFA's regarding their awarding of competitive franchises? Second, assuming the Commission does have such authority, is action by the Commission necessary? And finally if action should be taken by the Commission, what type of action would be most effective?

I. DOES THE COMMISSION HAVE THE AUTHORITY TO IMPOSE REGULATIONS OR GUIDELINES ON LFA'S?

**A. Commission's Authority to Implement Section 621(a)(1)**

In this NPRM, the Commission tentatively presumes and seeks comment on its authority to implement Section 621(a)(1) of the Act. The Commission correctly bases its presumption on Section 636(c) in conjunction with Section 621(a) of the Act, and *City of Chicago v. FCC*. It is clear from the language in Section 636(c) of the Act that Congress intended to preempt "any provision of law of any...franchising authority...which is inconsistent with this chapter."<sup>2</sup> Therefore, in conjunction with Section 621(a)(1), any provision of law of any franchising authority that constitutes an "unreasonable refusal" to award an additional competitive franchise would be deemed "inconsistent with this chapter" and therefore preempted.<sup>3</sup> The only authority left in question is the authority of the FCC to decide what constitutes an unreasonable refusal.

In *City of Chicago v. FCC*, the court, citing *Chevron U.S.A., Inc. v. Natural Resources Defense*, acknowledges that discretion is given to the FCC for

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<sup>2</sup> 47 U.S.C. § 556(c).

<sup>3</sup> *Id.*

interpretation where a statute is “silent or ambiguous.”<sup>4</sup> Section 621(a)(1) of the Act is silent as to the definition of the word “unreasonable,” setting forth no guidelines as to what constitutes an unreasonable refusal to issue a franchise. The court stated that it would not construe the statute itself, “when an agency has interpreted it in a reasonable manner.”<sup>5</sup> In that case the court upheld the FCC’s interpretation of the terms “cable operator” and “cable system.” Based on such precedent, it is clear that the FCC would be well within its power to define “unreasonable” refusal and therefore preempt any such action according to Section 636(c) of the Act. However, as the Commission noted in the NPRM, their authority should not be construed to “affect any authority of any...franchising authority, regarding matters of public health, safety and welfare.”<sup>6</sup>

## II. IS ACTION BY THE COMMISSION NECESSARY?

### A. **Current State of Multichannel Video Programming Distribution (MVPD)**

#### **Marketplace**

I have been a consumer for the last 7 years in the Los Angeles MVPD marketplace, and during that time I have lived in several different municipalities. In each municipality that I have lived including Santa Monica, Santa Clarita, Sherman Oaks and Downtown Los Angeles, I have had only one choice of cable service at a time. For me DBS providers have never been an option because of my need for internet services and, in some of my living situations, incompatibility with my

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<sup>4</sup> *City of Chicago v. FCC*, 199 F.3d 424 (7<sup>th</sup> Cir. 1999).

<sup>5</sup> *Id.*

<sup>6</sup> 47 U.S.C. § 556(a).

housing structure. Earlier this year I made a laughable attempt at accessing over-the-air broadcast television. Because I have no other option, I subscribe to the only cable provider in my area.

My current cable provider is completely substandard. I am overcharged for awful service including frequent pauses and malfunctions in the middle of programming. I am only one of many citizens in Los Angeles County who feel that there is no choice in video programming, and that the lack of choice has led to poor service and high prices. Currently there is a widespread television campaign in Los Angeles encouraging Angelinos who are outraged at the lack of competition in the Los Angeles video market to contact their legislators and demand action.

As the Commission well knows, this problem is not confined to the Los Angeles area. A study by the American Consumer Institute estimates that a lack of competition across the United States costs households over \$20 billion in benefits per year.<sup>7</sup> In that same study citizens living in newly competitive portions of Texas reported saving on average \$26.83 per month, without changing cable providers, as a result of increased competition.<sup>8</sup>

## **B. Franchising Delays Can Decrease Competition**

As noted in the NPRM new entrants attempting to compete nationally would have to negotiate with approximately 30,000 municipalities, each one with its own needs and requests that need met before a franchise is granted. While the local franchising process is important, ensuring that each community's best interests are

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<sup>7</sup> American Consumer Institute." Does Cable Competition Really Work? A Survey of Cable TV Subscribers in Texas."

<sup>8</sup> *Id.*

served, it is also lengthy and tedious. Because of this already lengthy process, it is important for the Commission to implement Section 621(a)(1) in a manner that will make this process as fast, effective and fair as it can be. By properly implementing Section 621(a)(1), the Commission can prevent delays in the franchising process and thereby promote the quick entry of additional competitors into the MVPD market. In order to determine exactly what action should be taken, the Commission should balance the complaints of franchise applicants with the concerns of the LFA's in servicing their communities.

### III. WHAT TYPE OF ACTION BY THE COMMISSION WOULD BE MOST EFFECTIVE

#### **A. Complaints of Franchise Applicants**

In the NPRM the Commission sought specific examples of LFA misconduct from franchise applicants. In several comments applicants complained of delays in the process and unfair fees being imposed on top of the franchising fee. However, the most common complaint that applicants listed concerned build-out requirements. Many feel that build-out requirements are unreasonable and should not be imposed on new applicants. Telcos are most concerned because they are frequently required to build-out beyond their current service areas. Applicants assert that the additional cost of this type of build-out requirement often prevents them from offering service in a municipality altogether.

Another common complaint of franchise applicants was that the licensing process even without unfair delays takes far too long. They believe that even if LFA's

act fairly and quickly the procedure of contacting each municipality serves as a barrier to entry. Many commented on how a state-wide approval system would remove this barrier and promote competition in the MVPD market.

## **B. What Applicants Really Want**

Based on their complaints regarding build-out requirements and the franchising process it seems that what these applicants really want is action beyond the scope of the Commission's authority. First, the Commission cannot eliminate build-out requirements because Section 621(a)(3) of the Act explicitly instructs LFA's to "assure that access to cable service is not denied to any group of potential residential subscribers because of the income of the residents."<sup>9</sup> One of the most important functions of an LFA is to ensure that companies do not enter exclusively into affluent areas leaving low income neighborhoods without service. The Commission does not have the authority take this power away from LFA's.

Second, the Commission cannot eliminate LFA's and create a streamlined state-by-state franchising system. State legislatures such as Texas and Indiana have reorganized their franchising systems eliminating the role of LFA's. If applicants want a state-by-state franchising system and a franchising approval without build-out requirements they should follow the proper channels to the legislature rather than the Commission.

Apart from eliminating LFA's and build-out requirements, applicants were most concerned with undue delays and unfair fees imposed by LFA's. These concerns

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<sup>9</sup> 47 U.S.C. §541

are of the nature that the Commission can address through implementation of Section 621(a)(1).

### **C. Suggested Guidelines**

In implementing Section 621(a)(1) of the Act it is important for the Commission to define “unreasonable refusal” in order to create guidelines for LFA’s to follow. The two main issues that should be addressed by the Commission are time and fees.

With regard to time the Commission should address two issues. First, the Commission should define how quickly the LFA must take initial action from the time an application is submitted. Second, the Commission should set guidelines for how long the entire process should take and what will be considered an “unreasonable” delay in the process. Based on guidelines that some states have implemented, the initial action time limit should be short, encouraging LFA’s to begin the franchising process as soon as possible. The entire franchising process will take months, so it is important for LFA’s take action within a few weeks of receiving an application. Texas requires that an LFA take action within 16 days. The commission should set a slightly more lenient guideline around 21 days. As a result, if an LFA does not act within the guideline it will be deemed to have acted “unreasonably” by FCC standards.

Because the application process involves negotiation, it is difficult to set a time limit on the process. One study showed that the current process takes an average of 9-12 months to complete. Applicants propose that this process should be completed

within 1-6 months. The Commission should compromise and recommend that the process take no more than 7 months to complete. By setting this guideline the Commission would establish a presumption for the courts that a process taking over 7 months is unreasonable. However this presumption could be rebutted by evidence that the applicant delayed the process by making unfair demands or failing to respond in a timely manner to the LFA.

The Commission should also define what types of fees will be considered unreasonable. In *Liberty Cablevision of Puerto Rico, Inc. v. Municipality of Caguas, C.A.* the court held that “fees imposed by municipalities...for use of municipalities’ rights-of-way, over and above franchising fees,” were preempted by the Act.<sup>10</sup> By listing fees that will be deemed unreasonable if imposed by an LFA, such as fees for rights-of-way, the Commission can help ensure that each new applicant is treated fairly by their LFA.

#### IV. CONCLUSION

It is important that the Commission create guidelines implementing Section 621(a)(1) of the act in a manner that will promote greater and faster entry into the MVPD market. As citizens grow increasingly frustrated with the lack of choice and the high price of cable they will demand action by the legislature as evidenced by the Los Angeles campaign. As a result state legislatures may take franchising authority away from municipalities in favor of faster state-wide franchising. While faster, this state action would likely result in franchising that fails to meet the specialized needs

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<sup>10</sup> *Liberty Cablevision of Puerto Rico, Inc. v. Municipality of Caguas*, 417 F.3d 216 (1<sup>st</sup> Cir. 2005).

of each community. If the Commission can successfully encourage LFA's to be fast and fair, communities can retain the benefit of having a local authority look out for their interests while experiencing the benefits of increased competition.

Respectfully submitted,

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